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4 P.O. Box 734  
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5

6 **BEFORE THE STATE OF CALIFORNIA**  
7 **STATE WATER RESOURCES CONTROL BOARD**  
8

9 **Ken Berry, and** ) **PETITION NO: \_\_\_\_\_**  
10 **Willits Citizens for Environmental** )  
11 **Justice,** ) **PETITION FOR REVIEW**  
12 **Petitioners** ) **WITH REQUEST FOR STAY**  
13 \_\_\_\_\_)  
14 **Regional Water Quality Control Board,** ) **(Water Code §§13320-13321)**  
15 **North Coast** )  
16 **Acting Agency** )  
17 \_\_\_\_\_)  
18 **City of Willits,** )  
19 **Real Party In Interest** )  
20 \_\_\_\_\_)  
21

22 **INTRODUCTION AND SUMMARY**  
23  
24

25 1. On November 29, 2006, the North Coast Regional Water Quality Control Board (RWB) held  
26 a Public Hearing to consider Order No. R1-2006-0108, revising the Compliance Schedule in  
27

1 Cease and Desist Order No. R1-2004-0095 and allow minimal connections to the City of Willits  
2 Wastewater Treatment Facility WDID No. 1B80078OMEN, NPDES No. CA0023060, which is  
3 a “project” within the meaning of CEQA (California Environmental Quality Act, Public  
4 Resources Code Section 21000 et seq.). This Petition is to appeal the approval of Order No. R1-  
5 2006-0108 to the State Water Resources Control Board (SWRCB) because the approvals were  
6 not made in accordance with law.  
7

8  
9 2. Petitioner Berry, on behalf of himself and the Willits Citizens for Environmental Justice  
10 (WCEJ), submitted written comments prior to the Public Hearing which identified the sections  
11 of the California Code of Regulations (CCR) and Public Resources Code (PRC) which the  
12 approval of Resolution R1-2006-0108 violates.  
13

14  
15 3. A stay is hereby requested on 1) all activity authorized by or dependent on the authorization  
16 of Order R1-2006-0108, and 2) all further approvals for projects subject to CEQA using a  
17 Categorical Exemption (CE) on sites listed on the Cortese List<sup>1</sup>. The laws that were violated are  
18 specifically for the protection of the environment, including the health and safety of human  
19 beings.  
20

21  
22 4. Approval of Order No. R1-2006-0108 was not processed in accordance with CEQA because  
23 Finding No. 9 cites California Code of Regulations (CCR) Title 14 section 15321, which section  
24 is one of the CEQA CE, but 14 CCR §15300.2(e) prohibits the use of CE on sites listed on the  
25

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26 <sup>1</sup> Government Code (GC) 65962.5(c)(3) requires that the Willits Waste Water Treatment Facility be listed on  
27 the Cortese List because Cease and Desist Orders No. R1-2001-007 issued to the City of Willits on June 28,  
2001 and Order No. R1-2004-0095 on November 29, 2004.

1 Cortese List.

2  
3 5. Finding No. 9 also cites Water Code (WC) §13389 and the California Court of Appeal recently  
4 ruled in *County of Los Angeles v. California State Water Resources Control Board* (2006) 143  
5 Cal.App.4th 985, mod. (Nov. 6, 2006, B184034), that WC §13389 contained a exemption from  
6 all of CEQA even though the language identifies a specific Chapter (3), not the entire Division  
7 (13) of the PRC.  
8

9  
10 6. By inclusion of 14 CCR §15321 in Finding No. 9 of Order No. R1-2006-0108, the RWB  
11 acknowledged that the action was subject to CEQA. Order R1-2006-0108 cites *both* WC §13389  
12 *and* 14 CCR §15321 as necessary for the exemption..  
13

14  
15 7. Petitioners believe the Legislative process was followed with due diligence when WC §13389  
16 was passed and signed into law, and that therefore the 4<sup>th</sup> Appellate District erred in ruling that  
17 all portions of CEQA are exempted.  
18

19  
20 8. WC §13389 does not apply to new facilities, as defined in the Clean Water Act (CWA) (33  
21 United States Code §1251 et seq.) . The proposed project involves the design and construction  
22 of new facilities and is therefore a new facility under the CWA and therefore WC §13389 does  
23 not apply to Order No. R1-2006-0108.  
24

25  
26 9. The RWB acted in violation of CEQA when the Board refused to publicly consider the letter  
27 submitted by Petitioner Berry.  
28

1  
2 10. The issues above are discussed below and in the Points and Authorities (P&A)<sup>2</sup>. The above  
3 list does not exhaust all defects, including the deprivation of the public of their right to participate  
4 in the approval process.  
5

## 6 7 **PETITION INFORMATION**

8  
9 11. The following information is provided in accordance with the instructions on the SWRCB  
10 website at the following URL on 12/27/06:  
11

12 [http://www.swrcb.ca.gov/wqpetitions/wqpetition\\_instr.html](http://www.swrcb.ca.gov/wqpetitions/wqpetition_instr.html)  
13

### 14 **1. Petitioners**

15  
16 Ken Berry  
17

18 10567 Mariposa Avenue

19 Jackson, CA 95642

20 209-223-1769

21 [berry-k@sbcglobal.net](mailto:berry-k@sbcglobal.net)  
22

23  
24 Donna Avilla, Willits Citizens for Environmental Justice

25 P.O. Box 734  
26

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27 <sup>2</sup> A true and correct copy is attached hereto as though set out at length.

Hydesville, CA 95547

## **2. Action**

Order R1-2006-0108 approved by the Regional Water Quality Control Board, North Coast (RWB).

## **3. Date**

The action being appealed was taken November 29, 2006.

## **4. Reason for Appeal**

The RWB acted in a manner contrary to law, namely PRC §21084(c), which is an element of CEQA. CEQA is designed to be enforced by public action. WC §13320 requires this appeal process as a prelude to judicial enforcement of CEQA.

## **5. Impact on Petitioner**

Petitioners are aggrieved as members of the public. The public has the right to expect that public servants will faithfully execute the law in their official actions, particularly when the law in question exists to guarantee minimal adverse impacts on the environment and public health. Petitioner WCEJ is an association of individuals, several of whom are

1 directly impacted by this project and/or members of the public.

2  
3 The California Legislature enacted CEQA and other statutes to protect the environment  
4 of the State. It the responsibility of citizens to protect the environment from adverse  
5 impacts under CEQA.  
6

## 7 8 **6. SWRCB Action Requested**

9  
10 Petitioners request that Order No. R1-2006-0108 be set aside and the RWB be ordered  
11 to prepare an environmental document (i.e., Negative Declaration or Environmental  
12 Impact Report as appropriate) before further action on the project.  
13  
14

## 15 **7. Points and Authorities**

16  
17 Petitioners have explained the major issues with regard to CEQA as Petitioners  
18 understand them at this time in the P&A. Petitioners reserve the right to use the most  
19 effective legal arguments known and available at the time of hearing, regardless of the  
20 analysis presented here.  
21  
22  
23  
24  
25  
26  
27  
28

1 **8. Notice**

2  
3 Complete copies of this Petition and the P&A were sent to the following parties via  
4 United States Mail with first class postage afixed:  
5

6  
7 Regional Water Quality Control Board, North Coast Region (Agency)  
8 5550 Skylane Boulevard, Suite A  
9 Santa Rosa, CA 95403  
10

11 City of Willits (Project Applicant / Property Owner)  
12 111 E. Commercial Street  
13 Willits, CA 95490  
14

15  
16 Ken Berry (Petitioner)  
17 10567 Mariposa Avenue  
18 Jackson, CA 95642  
19

20  
21 Donna Avilla, Willits Citizens For Environmental Justice (Petitioner)  
22 P.O. Box 734  
23 Hydesville, CA 95547  
24

1 **9. Issues**

2  
3 All of the issues raised herein and all facts discussed concerning the approval of Order  
4 No. R1-2006-0108 raised in this Petition, including the P&A, were properly raised at the  
5 Public Hearing held on November 29, 2006 to consider these matters.  
6

7  
8 **REQUEST FOR STAY**

9  
10  
11 12. This Petition requests that the SWRCB stay all further action authorized by or dependant on  
12 the authorization of Order R1-2006-0108. It further requests that the SWRCB cease and desist  
13 violating CEQA by citing CE for sites on the Cortese List.  
14

15 13. The following information is provided in accordance with the information on the SWRCB  
16 website at the following URL on 12/27/06:  
17

18  
19 [http://www.swrcb.ca.gov/wqpetitions/stayrequest\\_instr.html](http://www.swrcb.ca.gov/wqpetitions/stayrequest_instr.html)  
20

21 **1. Substantial Harm to Petitioner**

22  
23  
24 14. The State Water Resources Control Board (SWRCB) is entrusted with the protection of the  
25 health and safety of California residents and the protection of a safe environment through specific  
26 laws and regulations. It is a substantial harm to every citizen when the SWRCB systematically  
27

1 fails to obey state law because those laws are enacted by the people for the protection of their  
2 health and safety.

## 3 4 **2. No Harm to Others**

5  
6  
7 15. The only issue at stake is whether the proposed project has been processed according to the  
8 rules and regulations specified by Division 13 of the Public Resources Code and Title 14 of the  
9 Code of Regulations. No party is harmed by the SWRCB conforming to the requirements of state  
10 law.

## 11 12 13 **3. Substantial Questions of Fact and Law**

14  
15 16. There are substantial questions of both law and fact. These are discussed in the P&A and  
16 summarized in the Introduction to this Petition.

## DECLARATION

I, Ken Berry, submitted written comments at the Public Hearing where the appealed action was taken. All of the statements in this **Petition for Review and Request for Stay** and the accompanying Points and Authorities are true and correct to the best of my knowledge. Except regarding my personal experience and conclusions based on facts, all facts stated herein are accurate representations of documents in the record of proceedings for the project approved by Order No. R1-2006-0108. I so declare under penalty of perjury in Jackson, California on December 29, 2006.

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/s/ Ken Berry

Willits Citizens for Environmental Justice

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Telephone (209) 223-1769

3 Donna Avilla, Willits Citizens For Environmental Justice  
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6 **BEFORE THE STATE OF CALIFORNIA**  
7 **STATE WATER RESOURCES CONTROL BOARD**

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9 **Ken Berry, and** ) **PETITION NO: \_\_\_\_\_**  
10 **Willits Citizens for Environmental** )  
11 **Justice,** ) **POINTS AND AUTHORITIES FOR**  
12 **Petitioners** ) **PETITION FOR REVIEW**  
13 \_\_\_\_\_) **WITH REQUEST FOR STAY**  
14 **Regional Water Quality Control Board,** )  
15 **North Coast** )  
16 **Acting Agency** )  
17 \_\_\_\_\_)  
18 **City of Willits,** )  
19 **Real Party In Interest** )  
20 \_\_\_\_\_)

21  
22 **BACKGROUND**  
23

24 1. As summarized in the Petition for Review, the Regional Water Quality Control Board, North  
25 Coast (RWB, Regional Board) held a Public Hearing to consider Order No. R1-2006-0108,  
26 revising the Compliance Schedule in Cease and Desist Order No. R1-2004-0095 and allow  
27

1 minimal connections to the City of Willits Wastewater Treatment Facility WDID No.  
2 1B80078OMEN, NPDES No. CA0023060 (Willits WWTF). Order No. R1-2006-0108 is attached  
3 as Appendix A.  
4

5  
6 2. The approval of Order No. R1-2006-0108 was not processed in accordance with the California  
7 Environmental Quality Act (CEQA) for several reasons, and Water Code (WC) §13389 was  
8 inappropriately cited for the project. Violations of CEQA include the use of Categorical  
9 Exemptions (CE) for projects listed on the Cortese List<sup>1</sup> and the refusal of the Regional Board to  
10 consider evidence presented in writing at the Public Hearing. WC §13389 identifies an exemption  
11 to CEQA that applies to existing sources, as defined in the Clean Water Act (CWA) (33 United  
12 States Code §1251 et seq.). However, the proposed project satisfies the definition of a new  
13 source according to the CWA and therefore WC §13389 does not apply and was inappropriately  
14 cited.  
15  
16

#### 17 **A. CATEGORICAL EXEMPTIONS PROHIBITED FOR CORTESE LIST**

18

19 3. PRC §21084(c) prohibits the use of CE for projects listed on the Cortese List. This statute is  
20 the basis of 14 CCR (California Code of Regulations) §15300.2(e), which also prohibits the use  
21 of CE for projects on the Cortese List.  
22

23 4. The Willits WWTF is listed on the Cortese list because GC §65962.5(c)(3) requires that sites  
24 for which a Cease and Desist Order (CDO) is issued be included in the list. On June 28, 2001,  
25

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26 <sup>1</sup> Government Code (GC) §65962.5(c)(3) requires that the Willits WWTF be listed on the Cortese List because  
27 Cleanup and Abatement Order No. R1-2001-0071 was issued on June 28, 2001 to the City of Willits.

1 the RWB issued CDO No. R1-2001-0071. Therefore, the site of the Willits WWTF has been listed  
2 on the Cortese List since at least June 28, 2001, and therefore was listed on November 29, 2006,  
3 when Order No. R1-2006-0108 was issued.

4  
5 5. Finding No. 9 on page 2 of CDO R1-2006-0108 cites 14 CCR §15321, which exempts  
6 enforcement actions from the provisions of CEQA that require preparation of an environmental  
7 document (i.e., a Negative Declaration, ND, or Environmental Impact Report, EIR). The use of  
8 this exemption is prohibited by 14 CCR §15300.2(e).

9  
10 **B. ALL ENVIRONMENTAL EFFECTS MUST BE CONSIDERED**

11  
12 6. The RWB declined to consider the letter submitted by Ken Berry on his behalf and on behalf  
13 of the Willits Citizens for Environmental Justice (WCEJ). PRC §21167.6(e)(10) requires that the  
14 record of proceedings, for the purpose of determining CEQA compliance, include all relevant  
15 information concerning the potential impacts or effects of the project on the environment that is  
16 known to the public agency prior to the decision being made.

17  
18  
19 7. The Berry/WCEJ letter was received by the RWB prior to the close of the Public Hearing (PH)  
20 as indicated by the discussion of the letter prior to the Board's consideration of the matter.  
21 Therefore the Berry/WCEJ comments were timely and must be considered during judicial review  
22 of the RWB decision, regardless of the willful failure of the Regional Board to consider the fact  
23 that the RWB was preparing to take unlawful action.

24  
25  
26 8. The Berry/WCEJ letter does not raise any issues or facts not already in the record of  
27

proceedings. RWB staff and legal counsel are well aware of the 14 CCR §15300.2(e) prohibition on the use of CE. That action is not made unlawful by the Berry/WCEJ letter. The Berry/WCEJ letter merely exhausts administrative remedies by commenting on the fact already known to the RWB- namely that the proposed action is unlawful because it violates 14 CCR §15300.2(e) and PRC §21084(c). The RWB has an intrinsic and independent obligation to act in a lawful manner whether or not any comments are made on proposed unlawful action. The fact that Berry and WCEJ did comment has the effect that they may seek judicial review of the approval of Order No. R1-2006-0108.

### **C. WC §13389 DOES NOT APPLY TO NEW FACILITIES**

9. WC §13389 exempts the SWRCB and the Regional Water Quality Control Boards from compliance with Chapter 3 of Division 13 of the Public Resources Code prior to the adoption of waste discharge requirements, except for new sources as defined in the CWA<sup>2</sup>.

10. Title 40 of the Code of Federal Regulations (40 CFR) section 306 is concerned with the standard of control over sources of pollutants. 40 CFR §306(a)(2) defines “new source” to be “any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section that will be applicable to such sources.” 40 CFR §306(a)(3) defines “source” to be “any building, structure, facility, or installation from which there is or may be the discharge of pollutants”. 40 CFR §306(a)(5) defines “construction” to be “the placement, assembly, or installation of facilities or equipment ... at the premises where

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<sup>2</sup> WC §13389 refers to the “Federal Water Pollution Control Act or acts amendatory or supplementary thereto”. The “Clean Water Act” (CWA) is the name by which the latest revisions are now commonly known. The CWA may be found at 33 United States Code 1251 et seq. and Title 40 of the Code of Federal Regulations.

1 such equipment will be used...”.

2  
3 11. Order R1-2006-0108 contains the operative sentence on page 3, which amends the previous  
4 CDO, R1-2004-0095 to include 11 tasks to be completed between January 1, 2007 and October  
5 1, 2009. Tasks A and C require the City of Willits (Willits) to submit plans for a new headworks  
6 design to the RWB. Task D is to commence construction of the new headworks. Tasks E, F, and  
7 H are to submit plans describing the proposed project. Task I is the construction of the proposed  
8 project.

9  
10 12. Order R1-2006-0108 proposes the construction and operation of new facilities and therefore  
11 is a “new source” within the meaning of the CWA. Therefore WC §13389 does not apply to Order  
12 No. R1-2006-0108.

#### 13 14 **D. PRIOR EIR INSUFFICIENT**

15  
16 13. An EIR was prepared in compliance with Order No. R1-2001-0095, according to Finding 6  
17 on page 2 of Order No. R1-2006-0108. That EIR selected a preferred alternative that has been  
18 rejected, according to Finding 8, also on page 2. Therefore the EIR prepared for Order No. R1-  
19 2004-0095 does not satisfy the requirements of CEQA for Order No. R1-2006-0108.

20  
21 14. Even if the previous EIR was adequate to consider alternatives and justify the selection made  
22 by Order No. R1-2006-0108, that previous EIR must at least be certified by the RWB as the  
23 environmental document for that Order. Instead, Finding No. 9 cites a CE, which implies that no  
24 environmental document is necessary.



California Regional Water Quality Control Board  
North Coast Region

CEASE AND DESIST ORDER NO. R1-2006-0108

(AMENDING AND SUPPLEMENTING EXISTING  
CEASE AND DESIST ORDER NO. R1-2004-0095)

REQUIRING THE CITY OF WILLITS  
TO CEASE AND DESIST FROM DISCHARGING AND THREATENING  
TO DISCHARGE WASTE IN VIOLATION OF  
WASTE DISCHARGE REQUIREMENTS ORDER NO. R1-2001-0071  
NPDES PERMIT NO. CA0023060  
WDID NO. 1B80078OMEN

Mendocino County

The California Regional Water Quality Control Board, North Coast Region (hereinafter Regional Water Board) finds that:

1. The City of Willits (hereinafter permittee) owns and operates a municipal wastewater treatment facility (WWTF) located northeast of Willits adjacent to Broaddus and Baechtel Creeks, tributaries to Outlet Creek and the Eel River. The WWTF serves the City of Willits and the Brooktrails Community Services District. The WWTF consists of extended aeration, settling, disinfection, and dechlorination. Design flows are 1.3 million gallons per day (mgd) average dry weather and 3.0 mgd peak wet weather. Current dry weather flows average 0.70 mgd and peak wet weather flows exceed 3.0 mgd.
2. Waste Discharge Requirements Order No. R1-2001-0071 NPDES Permit No. CA0023060 (Order R1-2001-0071), adopted by the Regional Water Board on June 28, 2001 regulates activities at the WWTF.
3. Pursuant to provisions of the Water Quality Control Plan for the North Coast Basin (Basin Plan), Order No. R1-2001-0071 restricts treated effluent discharges to the Eel River and its tributaries to no greater than 1 percent of the receiving water flow during the allowable discharge season occurring from October 1 to May 14 each year.
4. The City of Willits is located in the Little Lake Valley in the upper portion of the Eel River watershed. Stream flows in Little Lake Valley fluctuate rapidly increasing in response to storm events and diminishing rapidly after each storm. Treated effluent flow from the WWTF frequently exceeds 1% of the receiving water flow.
5. Portions of Order No. R1-2001-71 being violated or threatening to be violated by continued discharges include:

**A. "DISCHARGE PROHIBITIONS**

2. The discharge of any waste to property not under control of the permittee is prohibited, except as authorized under D. SOLIDS DISPOSAL.
  3. Creation of a pollution, contamination, or nuisance, as defined by Section 13050 of the California Water Code (CWC) is prohibited. [Health and Safety Code, Section 5411]
  7. During the period of October 1 through May 14, discharges of wastewater shall not exceed one percent of the flow of the receiving waters."
6. Cease and Desist Order No. R1-2001-0071 was issued to the permittee on June 28, 2001. Order No. R1-2001-0077 contained a time schedule with 6 tasks requiring submittal of a draft, final, and certified environmental impact report (EIR) between June 1, 2002, and April 1, 2003. Order No. R1-2001-0071 further required design and complete construction between April 1, 2004, and June 1, 2006. The EIR tasks were completed, however the permittee required additional time to complete design and construction.
  7. On November 29, 2004, the Regional Water Board adopted Cease and Desist Order No. R1-2004-0095, establishing a new time schedule to complete key phases of design and construction. Preliminary design documents for a series of oxidation ponds and treatment wetlands were completed in compliance with Order R1-2004-0095 requirements.
  8. Initial permitting activities pursued by the Permittee indicate that the initial preferred alternative utilizing oxidation ponds and wetlands treatment would not be feasible. As a result, it is appropriate to provide a new time schedule for the Permittee to reassess design requirements and complete construction.
  9. Pursuant to Water Code section 13389 and title 14, California Code of Regulations, section 15321, this is an enforcement action for violations and threatened violations of waste discharge requirements and for the protection of the environment, and as such, is exempt from the requirements of the California Environmental Quality Act (Public Resources Code, section 21000 et seq.).
  10. On November 29, 2006, after due notice to the Permittee and all other affected persons, the Regional Water Board conducted a public hearing and received evidence regarding this Cease and Desist Order.

IT IS HEREBY ORDERED PURSUANT TO WATER CODE SECTIONS 13243, 13300 AND 13301 THAT Cease and Desist Order No. R1-2004-0095 is amended to read:

1. The Permittee shall cease and desist from discharging and threatening to discharge waste in violation of the terms of Order No. R1-2001-71 (NPDES Permit No. CA0023060) described in Finding No.5 above, by implementing the following time schedule:
  - Task A. By **January 1, 2007**, submit 50 percent design plans for a new WWTF headworks.
  - Task B. By **March 1, 2007**, submit for Executive Officer's review, a variance request to address surface water discharge dilution rates. The variance request shall conform to all requirements identified in accordance with the Implementation Plan, North Coastal Basin contained in the Basin Plan and at a minimum shall include evaluation of the following factors:
    - Identification of each constituent of concern (COC) known or reasonably thought to be present in WWTF effluent;
    - Documentation of existing water quality for each COC in the receiving water upstream of WWTF influence;
    - Comparison of most sensitive beneficial uses identified for the receiving water in the Basin Plan for each COC and their cumulative impacts; and
    - Evaluation of water quality and flows required in the WWTF effluent to protect the beneficial uses.
  - Task C. By **April 1, 2007**, submit final design plans for a new WWTF headworks.
  - Task D. By **June 1, 2007**, commence construction of the approved headworks design.
  - Task E. By **June 1, 2007**, submit conceptual design plans describing proposed project. The conceptual design plans shall be accompanied by federal 401/404 permit and water quality certification applications, as necessary.
  - Task F. By **November 1, 2007**, submit 50 percent design plans for the proposed project.
  - Task G. By **December 1, 2007**, complete construction of the headworks portion of the proposed project. Major earth-work shall be completed no later than October 1, 2007.

- Task H. By **April 1, 2008**, submit final design plans for the proposed project. The final design shall be accompanied by an application for waste discharge requirements permit renewal.
- Task I. By **June 1, 2008**, commence construction of the proposed project.
- Task J. By **August 1, 2009**, complete construction of the proposed project.
- Task K By **October 1, 2009**, attain full compliance with Waste Discharge Requirements by completing the implementation of long-term plans for treated effluent disposal during the wintertime season.
2. During the time period described above, the permittee shall operate and maintain, as efficiently as possible, all facilities and systems necessary to comply with **A. DISCHARGE PROHIBITIONS** 2, 3, and 7 to the maximum extent practicable.

Certification

I, Catherine E. Kuhlman, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, North Coast Region, on November 29, 2006.

---

Catherine E. Kuhlman  
Executive Officer